Preliminary Views of the United States Regarding Review of the DSU

1. The dispute settlement system of the WTO is essential to the success of the WTO as an organization, and to the success of the WTO Agreement as a set of rules for trade. The dispute settlement rules negotiated in the Uruguay Round included some fundamental changes from the GATT rules, changes which could greatly enhance the confidence of Members in the effectiveness of WTO obligations. In the negotiations that led to the Dispute Settlement Understanding, it was agreed as well that these new rules should later be subject to a comprehensive review on the basis of experience.

2. Over four years after Marrakesh, it is clear that these rules have functioned fairly well with respect to the panel and appellate process, but that significant problems remain in ensuring good faith implementation of the recommendations of the DSB. The rules of the DSU cannot be examined in isolation from the respect of Members for those rules. In this Review Members should strengthen and improve the DSU to ensure better implementation. But making WTO dispute settlement the effective instrument that negotiators intended will require as well the political will and commitment of Members, to respect the rules of the WTO Agreement and the results of WTO dispute settlement.

3. Against this background, the United States wishes in this initial paper to draw attention to two fundamental objectives that the Review should serve, and to raise some issues for examination in the light of those objectives.

-- The Ministerial Declaration of May 1998 notes: "Full and faithful implementation of the WTO Agreement and Ministerial Decisions is imperative for the credibility of the multilateral trading system and indispensable for maintaining the momentum for expanding global trade, fostering job creation and raising standards of living in all parts of the world." An effective dispute settlement system is essential to secure WTO implementation; the incentives for compliance in the dispute settlement system benefit even those Members that never bring disputes.

   Members want an effective dispute settlement system for the tangible results it can produce, not just the decisions it publishes. The participants in the Uruguay Round agreed to the better substantive rules in the WTO Agreement, and the change to real and effective implementation of panel and Appellate Body rulings and recommendations, because they believed that all Members would be equally bound to live by the bargains they had made.

   Accordingly, the results of this Review should *enhance prompt compliance.*

-- The Review must also serve to enhance the transparency of the dispute settlement system. In the Ministerial Declaration, the Ministers also stated: "We recognize the importance of enhancing public understanding of the benefits of the multilateral trading system in order to build support for it and agree to work towards this end. In this context we will consider how to improve the transparency of WTO operations." To strengthen public confidence in trade agreements and enhance support for the results of dispute settlement, we must increase public access to documents and hearings in the dispute settlement process.

Accordingly, the results of this Review should *enhance transparency.*

4. Some of these issues would imply changes in the DSU text, but many could be addressed effectively with immediate benefit through a change in agreed practice. As the practice in the first four years of the DSU has shown, parties to disputes can also agree with the panel on procedures that vary to some extent from the DSU rules. The dispute procedures of the GATT 1947 were built through just such incremental procedural innovation.

Compliance

5. An overriding concern with compliance led to the key difference between the DSU and the GATT dispute rules: the DSU's guarantee against blockage of panel establishment or adoption of the panel and AB reports, and the DSU provisions on implementation. This concern reflected well-known shortcomings of the GATT. As the end of the fourth year of the DSU approaches, the instances in which implementation of an adverse panel report has been completed are substantially outnumbered by those in which implementation is pending. Experience to date provides the basis for raising the following issues in the compliance area:

– review of the provisions concerning the "reasonable period," including arbitration. The negotiators of the DSU never intended that the period automatically be 15 months;

– clarification of the rules to ensure prompt implementation of the recommendations of the DSB;

– Members should not have to tolerate a situation in which one violation of WTO obligations is simply replaced with another, different violation; accordingly, through the review of the DSU, Members should consider how to prevent and address such action.

6. Fairness and efficiency in the dispute settlement system aid compliance. To this end, Members should consider the following issues:

– reviewing the panel selection process during the past few years and the difficulties experienced in forming high quality panels on a timely basis; examination of practical and institutional solutions to these difficulties;

– reviewing the time allocated to the various stages of a dispute, so that the time available can be used optimally without prolonging the overall length of the dispute settlement process; considering whether the time now allocated to some of the procedural steps, such as the requirement that a panel request be considered at two DSB meetings, could be better used later in the dispute process;

– as Korea and Pakistan have noted, elaboration of rules concerning conflicts of interest for panelists and the Appellate Body, who act in a quasi-judicial capacity, as well as for staff supporting panelists; the integrity of the panel process is essential to the credibility of the panel process and the WTO.

Transparency[1]

7. *Submissions by parties:* Under the DSU, a party may make its own dispute settlement submissions public, but in many instances a party requests that its submissions be treated as confidential documents. The secrecy of submissions fuels public suspicion of the dispute settlement process and undermines confidence in the WTO. It will not reduce public suspicion if submissions are made public only after the proceeding is over and input from stakeholders (to Members or to the panel) is therefore futile. Moreover, because the submissions are not public, the Secretariat describes them at length for the official record in the descriptive part of the panel report. And the submissions remain confidential even after they have appeared, sometimes verbatim, in the panel report. If submissions are public when submitted, the panel reports can be much shorter, and therefore faster and more economical to produce and translate.

8. The DSU provides that where a party to a dispute submits a confidential version of its submission to a panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be released to the public. However, no deadline is provided for submission of such non-confidential summaries.

Accordingly, Members should consider:

---

[1]In a separate context, the United States has proposed a decision by the General Council on issuance of panel reports. We urge that Members support this decision. As we have stated in that context, a panel report should in all cases be issued to the parties as an unrestricted document, and therefore be made publicly available, as soon as the entire report is completed in any of the official languages of the WTO and the "Findings and Conclusions" portion of the report is translated into the other two official languages. Such a change would in no way affect the date on which panel reports would be considered as "circulated to the Members" for purposes of the operation of the DSU. For DSU purposes, panel reports would be considered as "circulated to the Members" only on the date when the entire reports are circulated in all three of the WTO's official languages. This issue concerns the document restriction rules of the General Council, not the DSU rules, and therefore is not part of the DSU Review.

– agreement that all panel submissions should be public when submitted, with the exception of confidential business information; maintenance of submissions in a public docket at the Secretariat, open for inspection, or Internet publication of submissions on the Secretariat Website.

– provision of a deadline for non-confidential summaries of any confidential business information submitted.

Open hearings:

9. Disputes in the WTO now take place behind closed doors, even though hearings of national courts, and other international tribunals such as the International Court of Justice are open to the public. The lack of public access to dispute settlement hearings makes it more difficult to resolve disputes, due to suspicion of the non-transparent dispute process among private stakeholders. Public mistrust of the dispute settlement system undercuts public support for the WTO.

10. The United States has offered to open every panel meeting in which we are involved, and has challenged other WTO Members to allow observers in the audience at panel hearings. Such observers would not divert time or resources from the panel's work, and the panel can maintain an atmosphere of decorum and seriousness. Parties to a dispute can now agree to permit observers, and select panelists who will agree to such terms. Members should consider:

– changes to the DSU to require panel and Appellate Body meetings to be open to observers from all WTO Members and civil society except for those parts of meetings which deal with confidential business information.

Amicus submissions:

11. It is now clear that DSU panels and the Appellate Body have the discretion to receive submissions by stakeholders, as Pakistan has recognized in proposing to change the rules to eliminate this discretion. Many national court systems and international tribunals permit receipt of submissions from a stakeholder as *amicus curiae* in some circumstances. Submissions of relevant stakeholders could enhance panels' information and aid them in drafting reports that will help resolution of the dispute. Accordingly, Members should consider:

-- offering an opportunity in each dispute for submission of *amicus curiae* briefs to the panel and the Appellate Body.

Technical changes

12. Other delegations have mentioned a number of technical changes in dispute settlement procedures, and there will no doubt be many suggestions of a technical nature made during the course of the DSU Review. Many of these technical changes have merit. However, technical changes will not improve the dispute settlement process more than marginally unless we improve transparency and compliance.

13. The United States expects to submit further comments as the Review progresses.